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Supreme Court, U.S.
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No. 04202

IN THE

Supreme Court of the United States

MIKAIL KHASHAN,

Petitioner,

v.

NINTH CIRCUIT COURT OF APPEALS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals properly affirm, for the second time, a remand order because the order challenged in the appeal is not reviewable pursuant to *28 U.S.C. §1447(d)*?

CORPORATE DISCLOSURE STATEMENT REQUIRED BY SUPREME COURT RULE 29.6

Respondent WFS Financial, Inc. states that it is a California corporation, and has the following parent corporation: Westcorp Inc., a publicly traded company. No other publicly held company owns 10% or more of Respondent's stock.

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INTRODUCTION

The U.S. Court of Appeals for the Ninth Circuit denied, for a second time, Petitioner Mikail Khashan's appeal of a remand order for lack of jurisdiction pursuant to *28 U.S.C. §1447(d)*. Petitioner then petitioned for a writ of certiorari before this Court. The petition is without merit and should be denied.

This matter originally started out as a replevin action in the Superior Court for the County of Los Angeles, State of California, for breach of a retail installment sales contract secured by 1998 BMW, purchased by Petitioner, a California resident. Respondent WFS Financial, Inc., a California corporation, is the holder of the contract.

On the eve of trial, December 3, 2003, Petitioner removed the action for a second time to United States District Court for the Central District of California. The District Court remanded the matter back to Superior Court and Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, who affirmed the remand order. Petitioner then filed this petition for writ of certiorari. Petitioner is a paralegal who has abused the judicial system; this petition is nothing more than a delay tactic and should be denied.

STATEMENT OF THE CASE

On August 18, 2000, Petitioner purchased a BMW from Jim Allen Motors, and executed a written Motor Vehicle Contract and Security Agreement ("the Contract"). Jim Allen Motors assigned the Contract to Respondent who regu

larly purchases vehicle sale contracts throughout the state of California. Respondent perfected its lien on the BMW through the California Department of Motor Vehicles, and is named on the Certificate of Title for the Vehicle as lien holder of record. Petitioner made several payments, but then defaulted on his January 2001, payment.

On March 22, 2001, Petitioner filed for Chapter 7, bankruptcy protection, Case No. 01-121577 and on December 17, 2001, his debts were discharged. However, Respondent' lien on the BMW remained.

On April 26, 2001, Respondent obtained relief from the bankruptcy automatic stay to enforce its remedies to repossess or otherwise obtain possession and dispose of the BMW.

On February 27, 2002 Respondent filed in the California Superior Court for the County of Los Angles its complaint for breach of contract, common count, claim and delivery, conversion and possession of personal property, Case No. BC268963.

Petitioner filed a motion to quash service of the Summons and Complaint claiming the complaint was served on his sister and not him. The Superior Court denied Petitioner's motion to quash. Petitioner later appealed the denial of his motion to quash to the California Court of Appeal for the Second District. The Appellate Court dismissed Petitioner's appeal for failure to file a Case Information Statement (Local Rule 6).

On October 22, 2002, Petitioner filed an Answer to Respondent's complaint with the United States District Court for the Central District of California, which had the effect of removing the action to federal court.

On November 6, 2002, Respondent filed a motion to remand the proceeding back to state court.

On December 6, 2002 the District Court granted Respondent's motion to remand.

Not unexpectedly, on December 13, 2002 Petitioner filed a Notice of Appeal of the first remand order to the United States Court of Appeals for the Ninth Circuit. On June 20, 2003 the Ninth Circuit affirmed the District Court's Remand Order and after the passage of some time, the matter was remanded back to the Los Angeles Superior Court.

On some unknown date in 2003, Petitioner filed an "Emergency Motion for Stay of Mandate Pending Application for Certiorari" which was denied by the Ninth Circuit on November 18, 2003.

On September 16, 2003, the Superior Court overruled Petitioner's demurrer and motion to strike portions of Respondent's complaint and set the matter for trial on December 5, 2003.

On December 3, 2003, two days before trial, Petitioner filed a second "Notice of Removal to Federal District Court".

On December 4, 2003, the District Court issued a second remand Order directing that the above captioned matter again be returned to Superior Court.

Petitioner then filed a Motion for Reconsideration which was denied on December 18, 2003. In its Order, the District Court also set a December 24, 2003 deadline for Petitioner to apologize to the court for, *inter alia*, suggesting the District Court was communicating with Respondent and/or Respondent's attorney and/or Superior Court Judge Buckner without Petitioner being present.

On December 24, 2003, after the remand Order had been entered, Respondent filed a demand for recusal of Judge A. Howard Matz. Respondent also filed a declaration that, in essence, complied with the District Court's December 28, 2003 Order.

On January 12, 2004, Judge Margaret M. Morrow denied Respondent's motion to disqualify Judge A. Howard Matz.

On February 24, 2004, the United States Court of Appeal for the Ninth Circuit dismissed Respondent's appeal for lack of jurisdiction.

On March 30, 2004, the United States Court of Appeal for the Ninth Circuit denied Respondent's motion for reconsideration of its February 24, 2004, order.

On some unknown date, Respondent petitioned the United States Supreme Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

1. The Court of Appeal Properly Affirmed the District Court's Remand Order Because a Remand Order is Not Reviewable.

The Court of Appeals was without jurisdiction to hear the appeal of the District Court's December 4, 2003 Order remanding the matter to Superior Court. *28 U.S.C. §1447*; and *Kunzi v. Pan American World Airways, Inc.* 833 F.2d 1291 (9th Cir. 1987) [order remanding case for lack of jurisdiction is not reviewable].

2. Even if a Remand Order Was Reviewable, the District Does Not Have Jurisdiction.

Removal jurisdiction is only conferred on actions in which a federal court has original jurisdiction. *28 U.S.C. §1441(a).* Thus, actions that could not have been filed in federal court can not later be removed to federal court. Here this action can not be removed because it could not have been filed in federal court in the first place.

In order for a federal court to have jurisdiction, either originally or by removal, a well-pleaded complaint must establish that federal law creates the cause of action. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 US 1, 27-28 (1983); and *Rivet v. Regions Bank of Louisiana*, 522 US 470, 475 (1998).

The party seeking to invoke removal jurisdiction bears the burden of supporting its jurisdictional allegations with competent proof. *Wilson v. Republic Steel Co.*, 257 US 92, 97

(1921). The Court's removal jurisdiction must be analyzed on the basis of the pleadings at the time of removal. *Sparta Surgical Corp. v. National Ass'n of Securities Dealers*, 159 F.3d 1209, 1213 (9th Cir.1998). District courts must construe the removal statutes strictly against removal and resolve any uncertainty as to removability in favor of remanding the case to state court. *Takeda v. Northwestern Nat'l. Life Ins. Co.*, 765 F.2d 815, 818 (9th Cir.1985).

In determining whether the case "arises under" federal law, federal courts look solely to the necessary allegations of plaintiff's complaint (*i.e.* those essential to the cause of action). *Gully v. First Nat'l Bank*, 299 US 109, 112 (1936). The "well-pleaded complaint rule" makes Plaintiff the "master of the claim" for purposes of removal jurisdiction. This means that, absent diversity, a case is only removable where a federal question is presented on the face of plaintiff's complaint. *Caterpillar Inc., v. Williams*, 482 US 386, 392 (1987).

In the instant case, Respondent is pursuing Petitioner under state law to recover its collateral after breach of a retail installment sales contract. Respondent' complaint does not allege, assert, maintain, mention, or even refer to a federal claim. Accordingly, the present action does not raise any federal issue and the District Court does not have jurisdiction.

Petitioner alleges he has several counter-claims against Respondent, Respondent' counsel, the Superior Court of California and numerous others for violating his federal rights in this matter. However, for both original and removal

jurisdiction, the federal question must be presented by plaintiff's complaint as it stands at the time of removal. Removal cannot be based on a counterclaim, cross-claim or third party claim raising a federal question, whether filed in state or federal court. Otherwise, defendants could manipulate removal jurisdiction. *Metro Ford Truck Sales Inc. v. Ford Motor Co.*, 145 F.3d 320, 327 (5th Cir. 1998). Thus, Petitioner cannot use broad, ambiguous and unfounded claims against Respondent, Respondent's counsel, the Superior Court of California and others to maneuver the present action into federal court.[1]

Petitioner argues that "when a plaintiff by a voluntary act interposes a federal question that did not appear in the complaint as originally filed, the defendant may remove the case to federal court." *Federal Deposit Ins. Corp. v. Otero*, 598 F.2d 627 (1st Cir. 1979). In *Otero*, the court held the case was removable despite the fact that the complaint did not assert federal causes of action because a federal agency, the FDIC, stepped in as party plaintiff and put in issue the federal laws governing its rights and liabilities as a creditor.

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[1] Petitioner erroneously contends that 28 U.S.C. §1653 allows him to amend the pleadings to cure defective jurisdictional allegations. Respondent's complaint does not raise a federal question and Petitioner may not manipulate the case into federal court by making frivolous and vague cross-claims or counter-claims alleging civil rights violations. "For better or worse . . . a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case rises under federal law." *Franchise Tax Board*, 463 U.S. at 11.

Consequently, the court recognized that federal law would necessarily be involved in litigation of the action. Here, Respondent is the Plaintiff and is not a federal agency. Thus, Petitioner's reliance on *Otero* is entirely misplaced.

3. 28 U.S.C.§1443 Does Not Provide Authority For Removal Jurisdiction In This Matter.

Petitioner erroneously asserts that *28 U.S.C.§1443* provides authority for removal jurisdiction in this matter.[2] However, *28 U.S.C. §1443* was enacted when state court lawsuits were being used to thwart enforcement of civil rights laws. In modern practice, removal under these provi

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[2] 28 U.S.C. §1443 provides: "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending: (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof; (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." Removal under *28 U.S.C.§1443(2)* applies only to federal officers or persons assisting such officers in performing their duties under federal civil rights laws. *Greenwood v. Peacock*, 384 U.S. 808, 828 (1966). In the present case, removal under 28 U.S.C. §1443(2) does not apply because Respondent is not a federal officer, nor is it assisting such officers in performing their duties under federal civil rights laws.

sions is rare. *Davis v. Glanton*, 921 F.Supp. 1421, 1423-1424 (E.D. PA 1996).

In order to remove a case under *28 U.S.C. § 1443*, a two-part standard must be met. (*Id.*) First, a person must be deprived of a specific federal right pertaining to racial equality that is protected through a federal statute. *City of Greenwood v. Peacock*, 384 U.S. 808, 825-26 (1966); and, *Georgia v. Rachel*, 384 U.S. 780, 791-92 (1966). Secondly, the person must show that he will be deprived of this right in state court, either due to the existence of a state constitution or statute mandating discrimination, or alternatively because the adjudication of the claim in state court would inherently violate federal law. *Johnson v. Mississippi*, 421 U.S. 213, 219 (1975).

Here, the state court lawsuit is not being used to defeat enforcement of civil rights laws. Respondent is simply enforcing the lien rights Petitioner granted it under a motor vehicle financing agreement. To suggest that Respondent brought this action to thwart enforcement of a civil rights law is pure fiction.

By raising due process and similar federal questions, Petitioner is merely attempting to orchestrate removal jurisdiction so as to delay trial. There is simply no federal question jurisdiction presented here.

CONCLUSION

This petition for writ of certiorari is just another step in Petitioner's effort to delay trial and convert Respondent's property rights. The Court of Appeal's affirmation of the remand order was proper. There are not any grounds for Petitioner to seek review of the Court of Appeal's decision and Respondent respectfully requests that Petitioner's petition for writ of certiorari be denied. Respondent further requests an award of just damages and double costs against Petitioner pursuant to United States Supreme Court Rules 42 and 43 as this petition for writ of certiorari is frivolous and without any basis in fact or law.

DATED: September 9, 2004

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